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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES DEAN CLOUD,

Defendant.

1:19-CR-02032-SMJ-1

United States Response to
Defendant's Motion to Suppress
Victim's Positive Identification

March 17, 2020¹, at 9:30 a.m.
With Oral Argument

Plaintiff, United States of America, by and through William D. Hyslop, United States Attorney for the Eastern District of Washington, Thomas J. Hanlon, Assistant United States Attorney for the Eastern District of Washington, and Richard Burson, Assistant United States Attorney for the Eastern District of Washington, hereby submits its response to the Defendant's Motion to Suppress the positive identification of the Defendant by one of the Defendant's victims (ECF 147).

¹ Actual date and time for evidentiary hearing and argument to be scheduled on this date.

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I. Introduction

Our legal system is built on the premise that it is the province of the jury to weigh the credibility of witnesses. *Kansas v. Ventris*, 556 U.S. 586, 594 (2009). That province of the jury includes weighing the reliability of eyewitness identification against any admissible mitigating evidence the Defendant produces at trial, and against the backdrop of the other trial safeguards afforded the Defendant (e.g. jury instructions and the right to cross examine). The Defendant is asking this Court to take the extraordinary step of stripping the jury of that function. However, before even engaging in pretrial review of the reliability of eyewitness identification, the Court must determine whether the Defendant has met his burden under *Perry* to show that police engaged in misconduct that was both unnecessary and unduly suggestive. Only then does the Court engage in pretrial reliability analysis.

The Defendant has not cleared the first bar. There was no misconduct, and certainly no action on the part of law enforcement that was both unnecessary and suggestive. Agent Ribail conducted initial photo line-ups in accordance with FBI guidance issued on the very same day he conducted the line-ups. And the Defendant has not alleged any actions by Agent Ribail that were suggestive in any way. Similarly, the Yakama Nation did not engage in any misconduct or any action that was unnecessary. Yakama Nation's public safety announcement including a picture of the Defendant was not "calling out" any eyewitness. Yakama Nation was correcting

1 an earlier “all clear” message that they had posted when they thought both suspects in
2 a quintuple homicide were in custody. Upon learning that the Defendant was still at
3 large and likely armed and dangerous, they rightly alerted the community. Defendant
4 would have this Court find that action unnecessary, based primarily on Defendant’s
5 factually incorrect mischaracterization of the Yakama Nation’s actions.
6

7 Even if there had been misconduct, the question of whether J.V.’s identification
8 of the Defendant would still be one for the jury to weigh. Under *Manson* and its
9 predecessor cases, the Court must determine whether the totality of the circumstances
10 indicate a “very substantial likelihood of irreparable misidentification.” Here, where
11 J.V. announced that he was “100 percent” certain regarding his identification of the
12 Defendant, had ample time to view the Defendant over the course of ten minutes, and
13 provided a reasonable explanation for his earlier inability to pick the Defendant out of
14 a photo line-up, such circumstances are not present.
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18 The Defendant has the right to cross examine J.V. The Defendant has the right
19 to seek to call expert witnesses to rebut J.V.’s identification. The Defendant has the
20 right to advocate for jury instructions governing eyewitness identification. The
21 Defendant does not have the right to conceal his victim’s identification of the
22 Defendant from the jury when police engaged in no misconduct and circumstances do
23 not indicate a likelihood of irreparable misidentification.
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II. Background

A. Five dead bodies and an attempted kidnapping ignite a manhunt.

On June 8, 2019, just after 4:00 p.m., E.Z. called 911 and reported that she was in a truck headed west on Evans Road in White Swan. She told dispatch she was fleeing from her friend's house, where unknown assailants had opened fire on the vehicle she and her friends were in. Her friend L.L. was driving the truck from the passenger side of the vehicle, because her other friend, Dennis Overacker, was dead in the driver's seat, having been shot in the head. E.Z. and L.L. had both been shot, but survived. E.Z.'s infant child was unharmed.

E.Z. directed law enforcement to the residence in White Swan where she and her friends had been shot – 5151 Medicine Valley Road, the home of John Cagle, a man affectionately known as “Dobbie Jack.” Officers arriving at Dobie Jack's home encountered a grisly scene. Thomas Hernandez laid face down in the drive way, unconscious and suffering from a gunshot to the head that would later kill him. Just inside the front gate of the property, Catherine Eneas laid dead from a gunshot wound. Around back, near a game room, Michelle Starnes was found dead, also from an apparent gunshot wound. Finally, inside the game room, Cagle was found dead from a gunshot to the head. Discharged shell casings were littered about the bodies.

While tribal police secured the scene in White Swan, E.Z. was at a hospital in Yakima being interviewed by law enforcement. E.Z. told officers that she, Overacker,

1 L.L. and Hernandez had driven in Overacker's truck to Cagles's residence to check in
2 on Cagle, who was "getting along in age." When they arrived at Cagles's, they did not
3 see Cagle, but instead were confronted by two Indian males, one of whom told them
4 that Cagle was not seeing anyone. Hernandez got out and spoke to the two Indian
5 males, at least one of whom was holding a gun. Hernandez started walking back to the
6 truck when one of the men suddenly shot Overacker in the head. Hernandez was shot
7 next and fell in the driveway. One or more people opened fire on the truck. L.L.
8 managed to reach over Overackers's body and hit the gas, speeding away from the
9 residence while the truck was being peppered with shotgun blast. L.L. and E.Z. were
10 hit, but not killed.

14 Around the time E.Z. was being interviewed, the Defendant and his brother
15 were trying to make their escape out of the White Swan area. At approximately 4:45
16 p.m., N.V. called 911 and reported that two men had walked into her yard on Evans
17 Road approximately seven miles from the Medicine Valley murder scene, put a gun to
18 her young son's head, and stole her husband's truck. Responding officers spoke with
19 N.V., her husband, J.V. and their two children, S.V. and M.V. The family relayed the
20 following: S.V. was walking in the backyard when a "native male" walked up to him,
21 grabbed him by his shirt and put a gun next to his head. The assailant walked S.V. to
22 the house and told a second "native male" to "get the keys, Vance." N.V., seeing her
23 son being held with a gun to his head, frantically ran to J.V., who was inside the
24 house and told him to call 911. J.V. called 911 and reported that two men had
25 stolen his truck and were holding his son. The police responded to the scene and
26 found the truck in the White Swan area. The police interviewed N.V. and J.V. and
27 they both provided statements to the police. N.V. and J.V. both provided statements
28 to the police.

1 house, and told J.V. that there were two men in the yard, one of whom had a gun to
2 S.V.'s head. J.V. went to the garage area and saw one "native" man with a shotgun.
3 Just outside of the garage, he saw a second native man holding a pistol to S.V.'s head.
4 Both men yelled at S.V. to give them the keys to the vehicles that were parked there.
5 J.V. quickly went to the house's mudroom and retrieved the first set of keys he saw –
6 the keys to his wife's van. The man with the pistol wanted the keys to the truck
7 instead. J.V. attempted to comply while the man holding the pistol at S.V.'s head
8 yelled at J.V., accusing him of stalling. J.V. went into the house to retrieve the keys
9 for J.V.'s truck. The man with the shotgun followed, and kept apologizing for what
10 the two men were doing, while continuing to point the shotgun at J.V. J.V. retrieved
11 and handed over the truck keys. The man with the pistol ordered S.V. to get in the
12 truck. J.V. pleaded with the two men not to take his son. The men refused. J.V. asked
13 the men to let S.V. ride in the back of the truck. The assailants acquiesced to that
14 request, and S.V. got into the bed of the truck. As the two armed men sped away in the
15 truck, J.V. yelled for S.V. to jump. S.V. jumped out of the bed of the truck as the
16 vehicle kept going, escaping the two kidnappers. The family ran into the house and
17 called 911.

18 As police were talking to J.V., another responding officer saw two people in the
19 field directly behind J.V.'s house. Two officers went to the field and apprehended the
20 two people: M.S. and N.J. Both were taken into custody. A short time later, after
21

1 being provided *Miranda* rights, M.J. told officers the following about Medicine
2 Valley: He and N.J. had been with Donovan and James Cloud at Cagle's. The Clouds
3 were in Cagle's residence while M.J. and N.J. waited in the truck they had arrived in
4 with the Clouds. That's when M.J. heard gunshots. M.J. explained that the four of
5 them then fled Cagle's in a truck after ransacking Cagle's residence. The truck they
6 fled in (later determined to be Eneas') broke down (and was later found) near J.V.'s
7 house. M.J. and N.J. separated from the Clouds at that point and ran off through the
8 field where they were apprehended. They did not know where the Clouds went.
9

11 Detectives began combing the area and questioning residents as to the
12 whereabouts of the Clouds. As night fell and the next day dawned, the suspected
13 perpetrators of five murders, two attempted murders, one carjacking and one
14 kidnapping were still at large amongst the community and believed to be armed and
15 dangerous.
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18 B. Yakama Nation issues a public safety warning.

19 Donovan Cloud was apprehended on June 9, 2019 at approximately 2:00 p.m.
20 in Oregon, the day after the murders. When he was arrested, he was accompanied by
21 two women. One of those women had an outstanding warrant out of Washington
22 unrelated to the Medicine Valley investigation. She was arrested on the outstanding
23 warrant. News of the arrest was communicated through various agencies. The arrest
24 was communicated to the Yakama Nation, who, upon hearing that two individuals had
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1 been arrested, mistakenly thought that both of the Clouds had been arrested. At 3:19
2 p.m., the Yakama Nation mistakenly posted on their Facebook account that *both*
3 Clouds had been apprehended and were in custody, leaving the public to believe that
4 the people responsible for the killings and mayhem the day before were no longer at
5 large in their community. Exhibit A (Yakama Nation Facebook Post 1). Just under
6 two hours later, the Yakama Nation realized they had mistakenly given the “all clear”
7 to their community. Upon realizing that one of the men suspected of murdering five
8 people the day before was still at large, the Yakama Nation issued “UPDATED
9 INFORMATION” at 5:12 p.m. warning the public that James Cloud was still at large,
10 thought to be armed and dangerous, and was being sought by law enforcement for the
11 murders. Exhibit B (Yakama Nation Update). The updated public safety warning
12 included a photo of the Defendant taken after a September 17, 2018 tribal arrest. In
13 order to make it clear that their first post was a mistake, the Yakama Nation noted that
14 “due to misidentification,” one suspect remained at large. The “misidentification”
15 referred to Yakama Nation’s earlier misunderstanding that both Clouds had been
16 apprehended in Oregon. “Misidentification” did not refer to a misidentification by any
17 eyewitness.

18 C. The FBI conducts a photo line-up; J.V. does not pick out the Defendant.

19 The Federal Bureau of Investigation began assisting in the investigation the
20 same day of the murders, kidnapping and carjacking. Special Agent Ronald T. Ribail
21
22

1 took the lead (“Agent Ribail”). Agent Ribail is a 17 year veteran of the FBI. He has
2 received FBI training on conducting photo lineups, personally conducted
3 approximately 20 lineups in the course of his career, observed an additional 20, and
4 has trained new agents on how to conduct line-ups. As such, while state resources
5 processed the crime scene, Agent Ribail dispatched with Yakima County Sherriff’s
6 Office (“YCSO”) Detective Cypher to interview J.V. and his family and conduct a
7 photo lineup.
8
9

10 First, Agent Ribail and Detective Cypher went to the YSCO substation in Zillah
11 to compile a photo line-up for each of the four suspects in the murders and the related
12 carjacking and kidnappings. At the substation, Agent Ribail and Detective Cypher
13 used a Spillman Technologies software program to generate the lineups. Generation of
14 the lineups took approximately two hours. Separate line-ups were prepared for each
15 suspect. The photograph of each suspect was the most recent state law enforcement
16 photo on hand – the Defendant’s Spillman photo had been taken two years prior on
17 June 7, 2017 at the Yakima County Jail. None of the photos had been previously
18 shown to any of the witnesses. None of the photos contained indications of criminal
19 misconduct.
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23 Agent Ribail and Detective Cypher next went to J.V.’s residence. Agent Ribail
24 administered the photo line-ups with each of the family members: J.V., N.V., S.V. and
25 M.V. The line-ups were conducted in the drive way of the residence. The family
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1 members were interviewed and shown the photo line-ups separately and one at a time;
2 while one member was being interviewed and shown the line-ups, the other members
3 of the family were sequestered in the house. Agent Ribail started each lineup session
4 by reading the line-up instructions to the witness and allowing them to read the
5 instructions. Exhibit C (Instructions signed by J.V.). There was no information in the
6 surrounding area that could have influenced the identification. Agent Ribail used the
7 photos attached as Exhibit D for the line-up that included Donovan Cloud, the photos
8 attached as Exhibit E for the line-up that included James Cloud and the photos
9 attached as Exhibit F for the line-up that included M.J. The photos were shown to the
10 interviewee one at a time. Agent Ribail conducted each line-up by placing the six
11 photographs face down in a stack on the hood of a truck. Agent Ribail used a
12 “blinded” administration technique: he flipped the photographs over one at a time and
13 handed them to the interviewee, careful not to look at the photo himself. If the
14 interviewee paused for a long period of time or made any comments about the photo,
15 Agent Ribail would have to take the photo back from the eyewitness, or ask them at
16 what number photo were they looking, to know which photo they were looking at.

17
18 When Agent Ribail conducted the line-up with J.V. containing Donovan
19 Cloud’s photo, J.V. identified a photo of Donovan Cloud as the individual who had
20 held a pistol to his son’s head the day before. Exhibit C; Exhibit D at 6. When J.V.
21 was shown the line-up including a photo of James Cloud (Exhibit E), he did not
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1 identify anyone as one of the kidnappers, but stated that the kidnapper who held the
2 shotgun had rounded cheeks like the individual in Exhibit E at 5:

3 Defendant's 6/10/19 photo²:



Page 5 lineup photo:



When J.V. was shown the line-up including M.J., he stated that the individual in
picture four “looked similar in the eyes,” to the kidnapper who had held the shotgun,
but that the shotgun bearer had more facial hair:

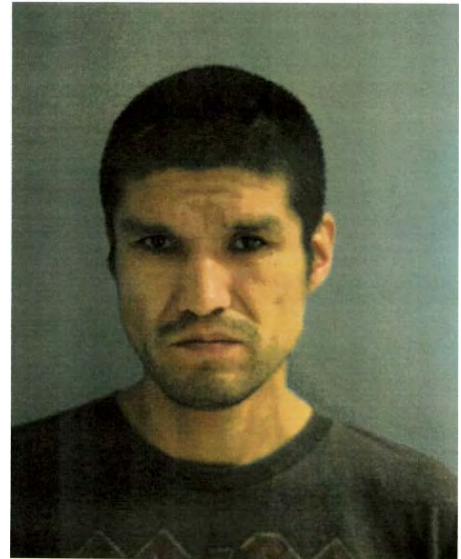
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² This is the Defendant's booking photo from when he was arrested on June 10, 2019, two days after the Defendant was seen by J.V., and the photo most recent to the carjacking/kidnapping.

Defendant's 6/10/19 photo:



Exhibit E, page 4 line-up photo:



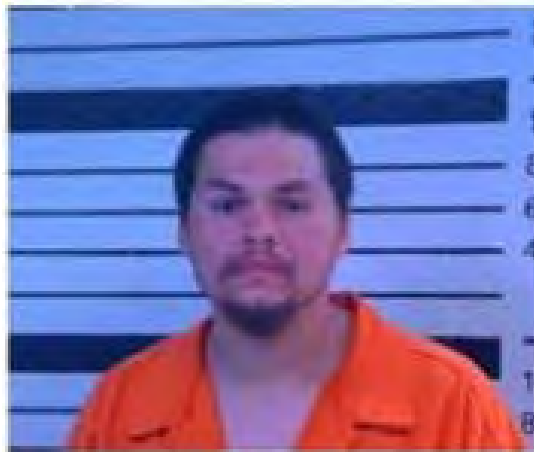
Despite being able to identify some individuals who shared characteristics with the Defendant, and being able to note certain differences, J.V. did not affirmatively identify the picture of the Defendant as one of the individuals who had terrorized his family the day before.

D. J.V. positively identifies the Defendant.

Agent Ribail and Detective Cypher returned to J.V.'s residence the next day, on June 10, 2019, to collect evidence in furtherance of their investigation. After they had concluded their search of the area, they were leaving the residence when J.V. flagged them down. J.V. informed Agent Ribail that he had seen online photos of each of the men who had kidnapped his son two days prior. J.V. stated that one of the photos showed the same person that had previously held a gun to his son's head. The other picture was a photo of the man who had held the shotgun. J.V. stated that he was "100

1 percent sure” that those were the two guys. J.V. asked Agent Ribail why Agent Ribail
2 had not used the pictures that were on Facebook when he conducted his line-up,
3 because the Facebook photos were better representations. Agent Ribail later asked
4 J.V. to send him the photos that he had seen on Facebook that he recognized to be
5 those of the kidnappers. In response, J.V. texted Agent Ribail a photo of Donovan
6 Cloud, and a link to the Yakama Nation public safety warning of James Cloud.
7
8 Exhibit G (J.V. text message).
9

10 J.V. had seen the photo of James Cloud posted by the Yakama Nation after the
11 Yakama Nation realized they had earlier spread an incorrect (and dangerously
12 misleading) “all clear” message to the community. When he saw that photo, he was
13 “100 percent sure” it was the man who had pointed a shotgun at him the day before:
14



23 E. J.V. exercises his rights a victim and attends the Defendant’s arraignment.

24 On July 18, 2019, the Defendant was arraigned on the Superseding Indictment.
25
26 J.V. exercised his right as a victim to attend the arraignment. 18 U.S.C. § 3771(a)(3).
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1 Even though J.V. had already identified the Defendant five weeks prior, on June 10,
2 2019, the Defendant sought to exclude J.V. from the hearing. The Magistrate rightly
3 denied the Defendant's motion.³ There was nothing in the record to suggest that J.V.'s
4 testimony would be materially altered by attending the proceedings *after* he had
5 already positively identified the Defendant a month prior. This was a not "show-up" -
6 J.V. had already identified the Defendant the month before.

9 **III. Analysis**

10 In order to successfully move this Court to conduct a review of the reliability of
11 an eyewitness identification before allowing a jury to decide reliability for themselves,
12 the Defendant must first show the existence of police misconduct that was (1)
13 unnecessary and (2) unduly suggestive. Without that showing, the inquiry ends before
14 any trial court review of reliability, and the jury is allowed to hear both the eyewitness
15 identification and any admissible evidence Defendant wishes to present to attack
16 reliability.
17

18
19 The Defendant falls short. The Defendant alleged that Agent Ribail did not
20 follow proper FBI procedure. In fact, Agent Ribail followed FBI guidance governing
21 the assembly and administration of photo line-ups issued on the very same day he
22 conducted the line-ups in this case. Any immaterial documentation errors of the line-
23 ups did not create suggestive circumstances, and Defendant has failed to articulate
24

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26
27 ³ See ECF 80.

1 how immaterial documentation errors would have had any influence on the
2 eyewitness' identification of the Defendant.

3 The Defendant also accuses the Yakama Nation of engaging in misconduct.
4
5 First, the Defendant's allegation that the Yakama Nation engaged in misconduct was
6 factually incorrect. The Yakama Nation was correcting a prior "all clear," not calling
7 out any eyewitness. Second, that action was certainly not unnecessary – the Yakama
8 Nation is obligated to alert its community when a suspect in a quintuple homicide is
9 believed to be armed and on the loose in the community.

11 Even if the Defendant had successfully shown police misconduct that was both
12 unnecessary and suggestive, J.V.'s identification is submitted to the jury, not barred
13 outright, because a totality of the circumstances, analyzed under *Biggers*, does not
14 indicate a "very substantial likelihood of irreparable misidentification" that cannot be
15 mitigated by the Defendant's right to cross examine J.V., call rebuttle witnesses and
16 advocate for appropriate jury instructions.

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18
19 A. The *Manson* test does not apply because there was no police misconduct that
20 created unnecessarily suggestive circumstances.

21 Because there is no evidence that any law enforcement official acted
22 improperly, J.V.'s identification cannot be hidden from the jury, and whether or not
23 his identification is reliable is a solely question for them to decide.

24
25 The Constitution protects a defendant against a conviction based on evidence of
26 questionable reliability, not by prohibiting introduction of the evidence, but by
27

1 affording the defendant means to persuade the jury that the evidence is unreliable
2 *Perry v. New Hampshire*, 565 U.S. 228, 237 (2012). Potential unreliability of
3 evidence does not render its introduction at trial fundamentally unfair. *See Ventris*,
4 556 U.S. 586 at 594 (rejecting a broad exclusionary test for uncorroborated jailhouse
5 snitch statements). Even assuming that eyewitness testimony is fallible, fallibility does
6 not, without the taint of police misconduct, justify a trial court screening the evidence
7 for reliability before allowing a jury to make that determination. *Perry*, 565 U.S. at
8 245. Before J.V.'s identification of the Defendant can be concealed from the jury, the
9 Defendant must show that police acted improperly in obtaining the identification by
10 creating circumstances that were both unnecessary and suggestive. *Id.* at 228 (citing
11 *Manson v. Brathwaite*, 432 U.S. 98, (1977)).

12
13 This prerequisite – an affirmative showing of police misconduct – makes sense,
14 and protects a cornerstone of our judicial system: the fundamental role of the jury to
15 weigh evidence. Without this prerequisite, the door would open to judicial review of
16 every eyewitness identification prior to its introduction to the jury. *Perry*, 565 U.S. at
17 243. That type of review would impermissibly trespass on the province of the jury to
18 weigh the reliability of evidence. It would also render null the protections already
19 afforded defendants in cautioning juries against placing undue weight on eyewitness
20 testimony the defendant believes unreliable. These protections include the Sixth
21 Amendment right to confront the eyewitness, *see Maryland v. Craig*, 497 U.S. 836,
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1 845 (1990) (“The central concern of the Confrontation Clause is to ensure the
2 reliability of the evidence against a criminal defendant.”); the right to an attorney who
3 can expertly test the eyewitness’ testimony through cross examination, and argue
4 unreliability to the jury, *Perry*, 565 U.S. at 246; and the protections already built into
5 the courts’ instructions to the jury to consider whether the identification was the
6 product of the eyewitness’s own recollection or was the result of subsequent influence
7 or suggestiveness. MODEL CRIM. JURY INSTR. 9th Cir. 4.11 (2020). A critical aim of
8 the prerequisite of police misconduct is not to rob the jury of their right to weigh
9 evidence, but instead to deter law enforcement from using improper line-ups, show-
10 ups and photo arrays. *Perry*, 565 U.S. at 241 (citing *Manson*). Because here, no police
11 conduct has been shown by the Defendant, the Court’s inquiry is complete under
12 *Manson* and *Perry*.

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17 a. Agent Ribail followed FBI procedure when he administered the
18 June 9, 2019 line-up.

19 On June 9, 2019, the same day Agent Ribail administered the photo line-up to
20 J.V., the FBI promulgated their Procedures for Eyewitness Identification of Suspects
21 Policy Guide⁴. Exhibit H (FBI Policy). That document and the policies therein
22 incorporate and rely upon the Department of Justice Memorandum, EYEWITNESS
23
24
25

26 ⁴ This document, minus the cover sheet and last page, was provided to Defendant’s
27 counsel on September 23, 2019 upon their request for FBI policy governing line-ups.

1 IDENTIFICATION: PROCEDURES FOR CONDUCTING PHOTO ARRAYS (Jan. 6, 2017)⁵. *Id.* at
2 19.

3 In incorporating the guidance of then Attorney General Sally Yates, and
4 updating their own internal policies consistent with the memorandum, the FBI
5 promulgated eight rules for agents to follow when assembling photo line-ups:
6

- 7 1. Prepare a separate photographic lineup for each suspect.
- 8 2. Select a photograph of the suspect that resembles the witness's description
9 of the perpetrator or the perpetrator's appearance at the time of the incident.
- 10 3. Avoid using photographs that are outdated or are substantially dissimilar
11 from the witness's description of the perpetrator.
- 12 4. Include at least five filler photographs that generally fit the witness's
13 description of the perpetrator.
- 14 5. Consider creating a consistent appearance between the suspect and fillers by
15 artificially adding or concealing any unique or unusual features (e.g., scars
16 or tattoos).
- 17 6. Select photographs that are of similar size, background, format, and color.
- 18 7. Not reuse photographs previously shown to the same witness.
- 19 8. Attempt to use photographs that do not indicate criminal misconduct (e.g.,
20 booking photographs). If a booking photo is the only available photograph
21 of the suspect, the number board or other indicia of prior arrest should be
22 covered or masked and similar masking must be used for all filler
23 photographs.

24 Exhibit H at 14.

25 Agent Ribail did not violate any of the guidelines when he assembled the photo
26 line-ups in this case.

27 ⁵ The memorandum relied on by Defendant.

The FBI also promulgated 16 rules for administering sequential photo line-ups:

1. Conduct the procedure separately for each witness.
2. Provide instructions to the witness as described in subsection 4.7.2., “Instructing the Witness.”
3. Conduct the photographic lineup in a location that does not expose the witness to information or evidence that could influence the witness’s identification.
4. Ensure that neither the suspect nor any photographs of the suspect are visible where the witness will be present.
5. Consider using “blind” or “blinded” administration techniques. In a blind administration technique, the administrator is not involved in the investigation and does not know what the suspect looks like. In a blinded administration technique, the photographs are shielded from the administrator’s view so he or she cannot see the placement of the suspect’s photograph, even if he or she knows what the suspect looks like. The use of blind or blinded administration of photo arrays is strongly encouraged whenever practicable.
6. Not allow the witness to observe or overhear other witnesses during the procedure.
7. Allow the witness as much time as needed to view the photographs.
8. Avoid providing the witness any feedback regarding an identification.
9. Ask the witness how confident he or she is regarding any identification made.
10. Consider the value of audio or video recording the procedure. (*See* DIOG subsection 18.5.6.4.17.2, “Recorded Noncustodial Interviews,” for approval and documentation requirements for recordings containing audio content.)
11. Have the witness initial and date the chosen photograph, if the witness makes an identification.
12. Request that the witness not discuss the identification procedure or its results with other witnesses involved in the case or have contact with the media.
13. Not advise the witness how many photographs he or she will be asked to view.
14. Present each photo to the witness separately, and remove each from view before presenting the next photograph.

1 15.Show all photographs at the same pace, even if the witness identifies a
2 photograph.

3 16.Allow the witness to view any of the photographs again upon request.

4 Exhibit H at 15.

5 Agent Ribail followed each of the above rules regarding the administration of
6 photo line-ups. But because the Defendant has inferred otherwise, a few of them are
7 worth discussing here.
8

- 9
10 i. Choosing not to record the line-up was not a violation of
11 FBI policy, and at any rate, did not create suggestive
12 circumstances.

13 The FBI instructs Special Agents to “[c]onsider the value of audio or video
14 recording the procedure” (emphasis added). Agent Ribail would testify that on the
15 morning of June 9, 2019, he dispatched to scene of the Medicine Valley murders to
16 lead the processing of the crime scene. Once he felt that assisting agencies had the
17 processing well at hand, he left with Detective Cypher to assemble the line-ups at the
18 nearest available place to do so: the YCSO Zillah substation. He then went to J.V.’s
19 residence in White Swan to interview the family and conduct the line-ups. Agent
20 Ribail had no equipment with which to record the interview. At any rate, recording or
21 not recording a line-up does not in any way suggest the identity of suspect. *Manson*
22 and *Perry* require not just any police misconduct, but evidence that police acted
23 improperly in obtaining the identification by creating unnecessarily suggestive
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1 circumstances. *Perry* 565 U.S. at 238-239 (citing *Manson* 432 U.S. at 107). Agent
2 Ribail's decision to not record the line-ups did not in any way create an unnecessarily
3 suggestive circumstance.

- 4
5 ii. Agent Ribail administered the line-ups using the blinded
6 administration technique required by FBI policy.

7 FBI policy instructs Agents to use one of two line-up administration techniques
8 when either is practical: blind or blinded. The blind method requires the use of an
9 Agent not involved in the investigation who does not know what the suspect looks
10 like. Agent Ribail will testify that he knew of no other Agent in the vicinity who did
11 not have knowledge of the investigation, and thus it was not practical to administer a
12 blind line-up. So, Agent Ribail used the blinded method: the photographs were
13 shielded from his view so he could not see the placement of the suspect's photograph.
14 In fact, Agent Ribail will testify that when J.V. indicated that he identified one of the
15 assailants, Agent Ribail did not realize that J.V. had identified Donovan Cloud until
16 he asked J.V. what number photo J.V. was looking at.
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- 20 iii. FBI policy requires that Agents request that the witness have
21 no contact with the media, not ignore public safety warnings
22 regarding the whereabouts of suspects who pose a danger to
23 the witness and his family.

24 The FBI policy requires that Agents request that line-up witnesses not have any
25 contact with the media. It does not request that Agents ask witnesses ignore or block
26 out public safety messages from law enforcement or their government. J.V. did not
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1 contact the media. For that matter, the record contains no evidence that he viewed or
2 had contact with any media output. J.V. viewed a public safety announcement issued
3 by the Yakama Nation, warning their community that an armed and dangerous suspect
4 in a quintuple homicide was loose in their community. Defendant's interpretation of
5 FBI policy would have Agent Ribail tell J.V. to put blinders on and avoid such
6 warnings, thereby endangering his own family.
7

8 J.V.'s family had been terrorized two days before. J.V. and his family had
9 witnessed the kidnapping of their son and the carjacking of their truck. They were the
10 only witnesses to the crime. Just before his family was terrorized, five people had
11 been shot dead ten minutes down the road. The man who pointed a gun at his son's
12 head and a shotgun at J.V. were still at large. They were obviously dangerous. They
13 were obviously armed. For Agent Ribail to tell J.V. to ignore public safety warnings
14 regarding the whereabouts of the Defendant and his brother would have been
15 irresponsible and dangerous. He was right not to instruct J.V. to avoid such warnings,
16 and failing to do so was not "misconduct."
17

18 Finally, even if FBI policy did (ridiculously) require that Agent Ribail warn
19 J.V. to avoid public safety warnings, J.V.'s viewing of the public safety warning here
20 would still not result in the showing of police misconduct required under *Perry*. See
21 *Schroeder v. Premo*, 714 F. App'x 666, 669 (9th Cir. 2017) (finding no police
22 misconduct, and thus allowing in-court identification *without* judicial reliability
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1 assessment, where the eyewitness had read a newspaper article that included a
2 photograph of the suspect and saw a brief news clip about the suspect's case prior to
3 identifying him in the photo lineup.).

4
5 iv. Agent Ribail generally followed FBI policy regarding the
6 documentation of line-ups, and documentation deficiencies
do not create unnecessarily suggestive circumstances.

7 In addition to guidance regarding the creation and administration of photo line-
8 ups, the FBI publishes to its Agent guidance regarding the documentation of line-ups.
9 Exhibit H at 17. Agent Ribail generally followed these procedures, with one
10 immaterial exception: he would testify that he did not record the amount of time it
11 took for J.V. to make the identification of Donovan Cloud.
12
13

14 But it begs the question: what unnecessarily suggestive circumstance was
15 created by Agent Ribail's failure to record the time it took for J.V. to identify
16 Donovan Cloud? None. What does the length of time it took J.V. to identify Donovan
17 Cloud have to do with the Defendant, James Cloud? Nothing. And how could failure
18 to record identification time of Donovan Cloud affect J.V.'s identification of the
19 Defendant the next day? It could not.
20
21

22 Agent Ribail followed FBI protocol when he administered the line-ups on June
23 9, 2019. There was no misconduct on his part. Defendant has not pointed to any action
24 on the part of Agent Ribail or any other law enforcement official that created
25 unnecessarily suggestive circumstances. Furthermore, the line-up generated a *non-*
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1 identification of the Defendant. How that that impacted J.V.'s identification a day
2 later is a question left unanswered by the Defendant.

- 3 b. The Yakama Nation did not commit misconduct by warning their
4 community that a man who was suspected of murdering five
5 people, attempting to murder two others, kidnapping a young child
6 and carjacking a family was armed and at large.

7 “A primary aim of excluding identification evidence obtained under
8 unnecessarily suggestive circumstances is to deter *law enforcement* use of *improper*
9 *procedures* in the first place.” *Perry* 565 U.S. 228 at 241 (emphasis added). The
10 rational for the *Manson* test is clear: we want to deter law enforcement from engaging
11 in conduct that creates unnecessarily suggestive circumstances influencing an
12 eyewitness. *Id.*

13
14 First, the Yakama Nation Facebook page is administered by the Yakama
15 Nation, not law enforcement. Second, the reason the Yakama Nation posted
16 Defendant's likeness on Facebook is obvious. White Cloud and the Yakama Nation
17 are not large communities. A quintuple homicide does not go unnoticed. A
18 community like the Yakama Nation is understandably put on high alert by a violent
19 crime spree such as the one that took place on June 8, 2019. It's no wonder that the
20 Yakama Nation informed their members that the suspects had been arrested and were
21 in custody. Exhibit A. It is equally obvious why the Yakama Nation would issue the
22 corrective public safety warning when they realized that their prior “all clear” was
23 incorrect. Even the Defendant acknowledges that there is nothing wrong with police

1 issuing a wanted poster. It goes without saying that Yakama Nation did nothing wrong
2 when it issued its corrective announcement. In fact, in light of their prior “all clear”
3 bulletin, the only responsible action was for the Yakama Nation to issue the corrective
4 posting that was later seen by J.V. To *not* issue the warning, and leave community
5 members under the impression that the Defendant had been arrested, would have
6 placed members of the community in further danger. This is not the kind of action that
7 the law seeks to deter.
8
9

10 The fact that Yakama Nation chose to describe its earlier “all clear” message as
11 a “misidentification” does not change the analysis. “Misidentification” was an obvious
12 reference to their earlier incorrect “all clear” posting. Without acknowledging that the
13 earlier “all clear” posting was incorrect, the second corrective warning would have
14 been confusing, leaving residents unsure of whether the Defendant had been arrested
15 or was still loose in their community. Defendant’s assertion that this was some sort of
16 “call out” of J.V. is flat wrong. There is no record of law enforcement telling the
17 Yakama Nation that J.V. had failed to identify the Defendant, nor any apparent reason
18 why they would. The Yakama Nation was not shaming anyone, certainly not J.V. The
19 Yakama Nation’s corrective public safety warning, including an indication that the
20 prior post was incorrect, was the only responsible action the Yakama Nation could
21 have taken. Certainly this is not the type of action that the *Manson* and *Perry* tests
22 seek to deter. The Yakama Nation should not have to choose between alerting the
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1 community of dangerous criminals and being able to call eyewitnesses in a later
2 prosecution. Their action was far from unnecessary and does not constitute
3 misconduct.

4
5 In fact, the actions of the Yakama Nation are almost identical to situations
6 *Perry* described as suggestive, but not warranting exclusion: “For example, suppose a
7 witness identifies the defendant to police officers after seeing a photograph of the
8 defendant in the press captioned “theft suspect,” or hearing a radio report implicating
9 the defendant in the crime. Or suppose the witness knew that the defendant ran with
10 the wrong crowd and saw him on the day and in the vicinity of the crime. Any of these
11 circumstances might have “suggested” to the witness that the defendant was the
12 person the witness observed committing the crime.” *Id.* at 244. Under *Perry*, those
13 identifications are put before a jury, not excluded from their purview. Similarly, J.V.’s
14 identification should be put before a jury.

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18 B. Even if the *Manson* test did apply, the identification procedure was not
19 unnecessarily suggestive.

20 Even if there had been misconduct, the Defendant must next show that the act
21 of misconduct was both unnecessary and suggestive. “[D]ue process concerns arise
22 only when law enforcement officers use[d] an identification procedure that is *both*
23 suggestive *and* unnecessary.” *Id.* at 238–239. A rule requiring automatic exclusion
24 upon a showing of misconduct would “g[o] too far,” for it would “kee[p] evidence
25 from the jury that is reliable and relevant,” and “may result, on occasion, in the guilty
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1 going free.” *Manson*, 432 U.S. at 112. Only those acts of misconduct that create
2 circumstances that are both unnecessary and suggestive satisfy the “police
3 misconduct” element of *Perry* and *Manson*. Although Defendant (wrongly) claims
4 that several acts constituted misconduct, the Defendant has only alleged that such one
5 act was unnecessarily suggestive: the Yakama Nation’s public safety warning that the
6 Defendant was still at large and dangerous⁶.
7

8
9 Whether an action was “unnecessary” and “suggestive” are separate inquiries.
10 *See Stovall v. Denno*, 388 U.S. 293, 302 (1967), *overruled on other grounds* by
11 *United States v. Johnson*, 457 U.S. 537 (1982). In *Stovall* (a case upon which *Manson*
12 is built), police had conducted a show-up by bringing the suspect handcuffed into the
13 victim’s hospital room and asking if he “was the man.” The victim later made an in
14 court identification. The Supreme Court recognized that the show up was of the type
15 that had been widely condemned, but upheld the conviction nonetheless because the
16 show up was necessary (it was thought the victim might die).
17
18

19 There is no contesting the Yakama Nation’s corrective public service alert was
20 equally necessary. It was the only reasonable action to take, given the dangerous
21 nature of the crimes that had been committed for which the Defendant was the sole
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23

24 ⁶ Defendant makes the conclusory statement that failure to record an interview and
25 failure to document the interview in detail somehow influences the interviewee (i.e. is
26 “suggestive”). Defendant stops short of providing any logical connection between
27 recording and documenting the interview (the latter of which would occur *after*
28 identification) and suggestiveness.

1 suspect at large. And because the alert was put out for the sole purposes of alerting the
2 community of the Defendant's dangerous presence and soliciting information as to his
3 whereabouts, it was necessary to include an accurate description of the Defendant (i.e.
4 his photo) and a description of the danger he posed. Nothing about the post was
5 unnecessary. Because it was not unnecessary, it cannot serve as the showing of police
6 misconduct required under *Perry*.
7

8
9 C. J.V.'s identification of the Defendant is reliable viewed in the totality of the
10 circumstances.

11 Finally, even if the Defendant could successfully show that there was some sort
12 of police misconduct that was both unnecessary and unduly suggestive, this Court
13 should still not take the extraordinary step of concealing J.V.'s identification of the
14 Defendant from the jury, because the circumstances do not indicate a "very substantial
15 likelihood of irreparable misidentification," and thus the identification evidence
16 should be admitted at trial and the reliability of the identification is "for the jury to
17 weigh." *Manson*, 432 U.S. at 114, 116. A "suggestive and unnecessary identification
18 procedure does not violate due process so long as the identification possesses
19 sufficient aspects of reliability," for reliability is the "linchpin in determining the
20 admissibility of identification testimony." *Id.* at 106. The factors to be considered in
21 evaluating the likelihood of misidentification are: (i) the opportunity of the witness to
22 view the criminal at the time of the crime; (ii) the witness' degree of attention; (iii) the
23 accuracy of the witness' prior description of the criminal; (iv) the level of certainty
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1 demonstrated by the witness at the confrontation and (v) the length of time between
2 the crime and the confrontation. *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972). The
3 *Biggers* factors, applied to J.V.'s identification of the Defendant, weigh heavily in
4 favor of allowing the jury to consider J.V.'s testimony for themselves.
5

6 a. J.V. had ample opportunity to view the Defendant at the time of
7 the crime.

8 Both parties agree that J.V. had ample opportunity to view the Defendant. Even
9 more so than Donovan Cloud. The Defendant was the perpetrator closest to J.V., and
10 followed him into the house. The Defendant was not wearing a mask. It was a bright
11 sunny day. The confrontation lasted for approximately ten minutes. J.V. had more
12 than enough opportunity to view the Defendant's face to allow him to make a reliable
13 identification.
14
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16 b. J.V.'s degree of attention was high during his interaction with the
17 Defendant.

18 J.V. was no mere bystander. He was the primary focus of the Defendant's ire.
19 He talked with the Defendant and Donovan Cloud. He negotiated with them. He
20 pleaded with them. There is no doubt that J.V. was paying attention to what the
21 Defendant and his brother were doing.
22

23 c. J.V.'s prior description of the Defendant was not inaccurate.
24

25 J.V. did not initially pick the Defendant out of a photo line-up. Likely because,
26 as J.V. later told Agent Ribail, the picture of the Defendant in Yakama Nation's public
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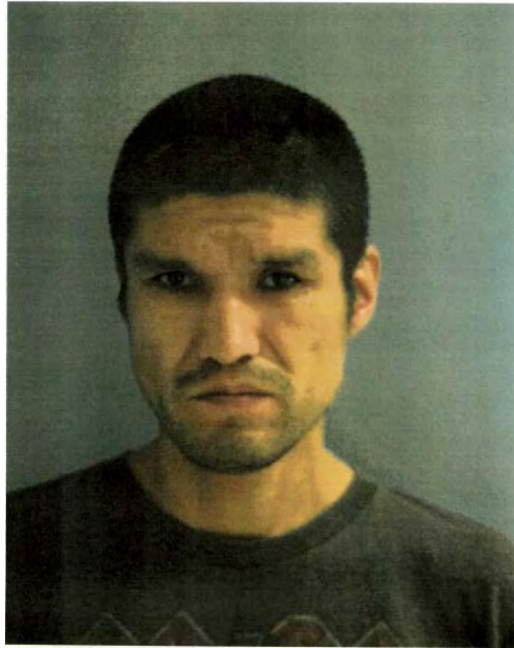
1 safety alert was a better representation of the Defendant. Whatever the reason the
2 Defendant did not initially pick out the Defendant, he did provide comparative
3 descriptors during the line-up. He indicated that the Defendant had similar cheeks to
4 this person:
5



16 That's a reasonable comparison to the Defendant's cheek structure and facial
17 hair:



1
2 J.V. indicated that the Defendant had similar eyes, but more facial hair, than
3 this man:
4



15 That is also not an inaccurate description:
16



1 J.V.'s comparative descriptions of the Defendant were not perfect, but not so
2 wholly off the mark to justify depriving the jury of the opportunity to hear his
3 testimony regarding identification, especially when all the other *Biggers* factors weigh
4 heavily in favor of admissibility.
5

6 d. J.V. was "100 percent sure" that the man pictured in the Yakama
7 Nation public safety warning was the man who pointed a shotgun
8 at him.

9 When J.V. told Agent Ribail that he had seen the two carjacking and
10 kidnapping suspects on Facebook, he said that he was "100 percent sure" that they
11 were the perpetrators. By J.V.'s words, his level of certainty that that the Defendant is
12 one of his assailants could not be higher.
13

14 e. J.V.'s identification of the Defendant occurred 24 to 48 hours after
15 the Defendant carjacked him and tried to abduct his son.

16 The kidnapping and carjacking took place on June 8, 2019 between 4:00 and
17 5:00 p.m. In the afternoon of June 10, 2019, J.V. told Agent Ribail that he had spotted
18 the Defendant in the public safety warning. Agent Ribail believes J.V. had viewed the
19 public safety warning sometime the evening of June 9, 2019. These times are all
20 recent enough for J.V. to have retained his memory of the Defendant's appearance.
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23 Each of the *Biggers* factors weighs in favor of admissibility. Defendant's
24 motion turns *Biggers* on its head by stating that because J.V. had ample time to view
25 the Defendant, a high degree of attention during the incident, a high level of certainty
26 in the subsequent identification and little time to forget what the Defendant looked
27 like.
28

1 like, that somehow the identification is *less* reliable. That's an interesting sleight of
2 hand, but not how the *Biggers* test works.

3 Finally, at play here is the open question: why was J.V. not able to identify the
4 Defendant in the line-up, but able to identify him when he saw the public safety
5 warning? Certainly, that's a question that a jury should be allowed to consider. But
6 it's not hard to see why J.V. might not have picked the Defendant out of the initial
7 line-up. As J.V. told Agent Ribail, the photo in the safety alert was a better
8 representation of the Defendant. He was right:
9
10

11 Defendant's line-up photo:



23 Defendant's photo posted by Yakima
24 Nation:



Aside from a goatee, which J.V. indicated the Defendant had when he was
comparing photos in the lineup the day before, the two photos are dissimilar: they
differ in chubbiness, skin tone, even apparent facial structure. Note, the picture on the

1 right, from the Yakama Nation public safety warning, is in unaltered form. Curiously,
2 the Defendant altered the same photo when he included it in his motion⁷ by stretching
3 it, which made it seem more comparable to the line-up photo, and giving the line-up
4 photo the “thicker” appearance the Defendant argues was closer to an initial
5 description given by S.V. As seen above, Yakama Nation photograph on the right is
6 actually the “thicker” of the two, and closer to S.V.’s description, not the other way
7 around.
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10 The photo of the Defendant from the Yakama public safety warning is also a
11 better representation of the Defendant’s appearance at the time of the offense than the
12 two year old line-up photo:
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27 ⁷ Defendants Motion, page 37.

Photos posted by Yakama Nation:



Photos taken two days after J.V. saw the Defendant:



Weighing the *Biggers* factors, the Court cannot come to the conclusion that circumstances indicate a “very substantial likelihood of irreparable misidentification,” *Manson*, 432 U.S. at 116. Thus the identification evidence should be admitted at trial and the reliability of the identification is “for the jury to weigh.” *Id.*

1 D. Courts applying the *Manson / Perry* test permit eyewitness testimony under
2 these circumstances.

3 In *Perry*, the Supreme Court held that a defendant must show improper police
4 conduct. *Perry*, 565 U.S. at 241. Even before *Perry*, the court had linked the due
5 process check of exclusion “not to suspicion of eyewitness testimony generally, but
6 only to improper police arrangement of the circumstances surrounding an
7 identification.” *Id.* at 242 (citing *Coleman v. Alabama*, 399 U.S. 1 (1970)). *See also*
8 *Colorado v. Connelly*, 479 U.S. 157, 163 (1986) (Where the “crucial element of police
9 overreaching” is missing, the admissibility of an allegedly unreliable confession is “a
10 matter to be governed by the evidentiary laws of the forum . . . and not by the Due
11 Process Clause.”); *Schroeder v. Premo*, 714 F. App'x 666, 669 (9th Cir. 2017)
12 (“Under *Perry*, however, only police-created impermissibly suggestive circumstances
13 implicate due process concerns and thus require a reliability assessment by the trial
14 court.”).

15 In *Schroeder*, cited above, the Ninth Circuit found no police misconduct where
16 the eyewitness had read a newspaper article that included a photograph of the suspect
17 and saw a brief news clip about the suspect’s case prior to identifying him in a photo
18 lineup. 714 F. App'x at 669. Thus, the Ninth Circuit held that the trial court did not err
19 by admitting the identification without judicial review of reliability.

20 In *Boyer v. Chappell*, the Ninth Circuit found that, because there was no police
21 misconduct, a trial court did not err by admitting in-court identification, despite the
22

1 witness having mis-identified the defendant in two live line-ups and one photo line-
2 up. 793 F.3d 1092, 1100 (9th Cir. 2015). There, in two prior live line-ups, the witness
3 picked out men other than the defendant. In a subsequent photo line-up, she also
4 picked out someone different than the defendant. Although there were obvious
5 deficiencies, the Ninth Circuit held that because the unreliability did not stem from
6 “unnecessarily suggestive circumstances arranged by law enforcement . . . the state
7 court did not unreasonably apply clearly established Supreme Court precedent [*Perry*]
8 when it determined that federal law did not require a live evidentiary hearing to assess
9 the reliability of [witness’] testimony.” *Id.*

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13 In *Benjamin v. Gibson*, an 11 year old girl failed to identify the defendant as the
14 perpetrator and instead picked out another man in a photo line-up. She reiterated that
15 mis-identification at a preliminary hearing (at which the defendant was presumably
16 present), again failing to identify the defendant. Then, after a lunch break, she took the
17 stand, recanted her testimony, and identified the defendant. She was allowed to
18 identify the defendant at a later trial. Despite the obvious reliability issues, the Ninth
19 Circuit held that counsel was not ineffective by not moving to suppress her testimony,
20 because the motion would have likely been unsuccessful since there was no police
21 misconduct. 640 F. App’x 656, 658 (9th Cir. 2016) (unpublished).

1 It's clear from the above line of cases, in order for this Court to even consider
2 concealing J.V.'s identification of the Defendant from the jury by engaging in a
3 review of his reliability, it must first identify circumstances that were:

- 4 1. Caused by police misconduct;
- 5 2. Unnecessary; and
- 6 3. Unduly suggestive.

7
8 The Defendant has not identified any such circumstances. Therefore, the
9 Court's inquiry ends here and the question of reliability is one for the jury.
10

11 E. This Court should not take the extraordinary step of casting aside *Manson* and
12 *Perry* and exclude the evidence under Rule 403.

13 *Perry* is clear: without police misconduct creating unnecessary and suggestive
14 circumstances, eyewitness identification of a defendant cannot be excluded. To
15 exclude an eyewitness identification without a showing of police misconduct is to
16 ignore the Supreme Court's holding in *Perry*. This Court cannot simply toss aside on-
17 point Supreme Court precedent governing the admissibility of evidence simply on the
18 basis that Rule 403 is also applicable. Rule 403 is always applicable. But where the
19 Supreme Court has established a detailed test for the admissibility of evidence, as it
20 has with eyewitness identifications like the one here, Supreme Court precedent
21 controls. Otherwise, every Supreme Court ruling governing the admissibility of
22 evidence would be swallowed by Rule 403.
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1 There is nothing to differentiate J.V.s identification of the Defendant from the
2 eyewitness identification at issue in *Perry* or in the numerous Ninth Circuit decisions
3 cited above. In each case, the testimony is or will be that the Defendant was the person
4 who committed the crime. J.V.'s identification cannot be treated differently than the
5 witness in *Perry*. In both, there was no police misconduct. Just as the Supreme Court
6 held that the inquiry in *Perry* could go no further, so must this Court.
7

8 **IV. Conclusion**

9
10 The Defendant is asking this Court to take the extraordinary step of stripping
11 the jury of their primary function: the weighing of evidence. The law is clear that the
12 Court can do so only after identifying police misconduct that is both unnecessary and
13 unduly suggestive. The Defendant has proffered no such actions on the part of law
14 enforcement. Furthermore, the totality of the circumstance surrounding J.V.'s
15 identification of the Defendant indicate that the identification was reliable, and
16 certainly not do not indicate a risk of irreparable misidentification.
17
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19 For those reasons, the Defendant's motion should be denied, and the jury
20 allowed to fulfill its proper role.
21

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1 DATED: March 6, 2020, 2020

William D. Hyslop
United States Attorney

2 *s/ Thomas J. Hanlon*

3 Thomas J. Hanlon
4 Assistant United States Attorney

5 *s/ Richard Burson*

6 Richard Burson
7 Assistant United States Attorney

8 I hereby certify that on March 6, 2020, I electronically filed the foregoing with the
9 Clerk of the Court using the CM/ECF System which will send notification of such filing
10 to the following: Lorinda Youngcourt, Esq.; John B. McEntire, IV, Esq.; Jeremy B.
11 Sporn, Esq.

12 *s/ Richard Burson*

13 Richard Burson
14 Assistant United States Attorney